

¹ 5 U.S.C. § 8101 *et seq.*

his federal employment including continuing exposure to loud gun fire. He noted that he first became aware of his condition and its relationship to his federal employment on September 1, 2014. Appellant did not stop work.

In an undated response to a hearing loss questionnaire, appellant noted that he worked for the employing establishment from December 1998 to the present. He indicated that he was exposed to moderate occupational noise from 1998 through 2005 related to firearms training. Appellant further stated that he worked as a border patrol firearms instructor at the employing establishment's U.S. Border Patrol Agent Academy from 2006 through 2014 and was exposed to extremely loud firearms noise when training at both indoor and outdoor firearms ranges, 8 to 12 hours per day, five days per week. He lastly indicated that he has worked as a border patrol agent at the employing establishment's U.S. Border Patrol Agent Weslaco Station since January 2012 and continues to be exposed to noise while qualifying 500 agents each quarter in the proficient use of handguns, shotguns, and rifles. Appellant indicated that he did not have a history of any previous ear or hearing issues and did not engage in any hobbies which involved exposure to loud noises. He asserted that the constant exposure to loud noises while working as a border patrol agent caused his gradual hearing loss.

On December 4, 2019 OWCP referred appellant, along with a statement of accepted facts (SOAF), to Dr. Charles Theivagt, an otolaryngologist, for a second opinion evaluation.

In a report dated February 4, 2020, Dr. Theivagt reviewed the SOAF, performed a physical examination, and completed OWCP's questionnaire. He indicated that there was no significant variation from the SOAF. Dr. Theivagt diagnosed mild sensorineural hearing loss in both ears and opined that this was due to noise exposure related to appellant's federal employment. He reviewed an audiogram conducted by an audiologist on that same date, which demonstrated losses of 15, 15, 20, and 25 decibels (dBs) on the right and 20, 25, 25, and 30 dBs on the left at 500, 1,000, 2,000, and 3,000 Hertz (Hz), respectively. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),² Dr. Theivagt calculated that appellant had a monaural loss of zero percent in each ear for a binaural loss of zero percent. He completed a tinnitus handicap inventory (THI) and rated the tinnitus diagnosis at one percent permanent impairment to arrive at a total binaural hearing impairment rating of one percent.

By decision dated February 20, 2020, OWCP accepted appellant's claim for binaural sensorineural hearing loss.

On February 21, 2020 appellant filed a claim for a schedule award (Form CA-7).

On February 25, 2020 OWCP referred a copy of the medical record and SOAF to Dr. Jeffrey M. Israel, a Board-certified otolaryngologist serving as a district medical adviser (DMA), for calculation of appellant's percentage of permanent hearing impairment and assignment of the date of maximum medical improvement (MMI).

² A.M.A., *Guides* (6th ed. 2009).

In a March 9, 2020 report, Dr. Israel noted that he reviewed the SOAF and medical record, including Dr. Theivagt's February 4, 2020 report.³ He reviewed appellant's February 4, 2020 audiogram and concurred with Dr. Theivagt's assessment of zero percent monaural loss in each ear. Dr. Israel noted that the February 4, 2020 THI corresponded to a one percent tinnitus impairment. However, he opined that, under the sixth edition of the A.M.A., *Guides*, a tinnitus award could not be given when there was zero percent binaural hearing impairment. As such, Dr. Israel found that the total binaural loss was zero percent. He recommended yearly audiograms, use of noise protection, and authorization for a left-sided hearing aid. Dr. Israel determined that appellant had reached MMI on February 4, 2020, the date of the most recent audiogram and Dr. Theivagt's examination.

By decision dated March 31, 2020, OWCP denied appellant's schedule award claim, finding that his hearing loss was not sufficiently severe to demonstrate ratable impairment, and he was, therefore, not entitled to schedule award compensation.

On April 27, 2020 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

OWCP thereafter received audiometric testing dated June 29, 1998 indicating that appellant had normal hearing at that time. It also received a July 6, 2018 letter of Dr. Andrew L. Phillips, an occupational medicine specialist, noting abnormal hearing based upon a June 14, 2018 employing establishment examination.

A hearing was held on September 21, 2020.

OWCP subsequently received a September 21, 2020 report from Dr. Ann Wang, an audiologist, indicating that appellant's audiological testing results revealed mild high frequency sensorineural hearing loss in the left ear and normal hearing in the right ear.

By decision dated October 29, 2020, OWCP's hearing representative affirmed the March 31, 2020 denial of appellant's schedule award claim.

LEGAL PRECEDENT

The schedule award provisions of FECA⁴ and its implementing regulations⁵ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as

³ Dr. Israel's report appears to contain a typographical error indicating Dr. Theivagt's report is dated February 24, 2020.

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

the uniform standard applicable to all claimants.⁶ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁷

A claimant seeking compensation under FECA has the burden of proof to establish the essential elements of his or her claim.⁸ With respect to a schedule award, it is the claimant's burden of proof to establish permanent impairment of a scheduled member or function of the body as a result of his or her employment injury.⁹

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.¹⁰ Using the frequencies of 500, 1,000, 2,000, and 3,000 Hz, the losses at each frequency are averaged. Then, the fence of 25 dBs is deducted because, as the A.M.A., *Guides* point out, losses below 25 dBs result in no impairment in the ability to hear everyday speech under everyday conditions. The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss. The binaural loss is determined by calculating the loss in each ear using the formula for monaural loss, the lesser loss is multiplied by five, then added to the greater loss, and the total is divided by six to arrive at the amount of binaural hearing loss.¹¹ The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.¹²

Regarding tinnitus, the A.M.A., *Guides* provides that tinnitus is not a disease, but rather a symptom that may be the result of disease or injury.¹³ If tinnitus interferes with activities of daily living, including sleep, reading, and other tasks requiring concentration, up to five percent may be added to a measurable binaural hearing impairment.¹⁴

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish ratable hearing loss for schedule award purposes.

⁶ *Id.* at § 10.404(a); *see also* Jacqueline S. Harris, 54 ECAB 139 (2002).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁸ A.M., Docket No. 20-1041 (issued December 7, 2020); D.H., Docket No. 20-0198 (issued July 9, 2020); John W. Montoya, 54 ECAB 306 (2003).

⁹ R.R., Docket No. 19-0750 (issued November 15, 2019); Edward Spohr, 54 ECAB 806, 810 (2003); Tammy L. Meehan, 53 ECAB 229 (2001).

¹⁰ A.M.A., *Guides* 250.

¹¹ *Id.*

¹² G.T., Docket No. 19-1705 (issued April 16, 2020); E.S., 59 ECAB 249 (2007); Reynaldo R. Lichtenberger, 52 ECAB 462 (2001).

¹³ *See* A.M.A., *Guides* 249.

¹⁴ *Id.*

OWCP referred appellant to Dr. Theivagt for a second opinion examination to evaluate his hearing loss. In his February 4, 2020 report, Dr. Theivagt diagnosed mild sensorineural hearing loss in both ears and tinnitus due to noise exposure related to appellant's federal employment. He calculated that appellant had a monaural loss of zero percent in each ear for a binaural loss of zero percent. Dr. Theivagt then rated appellant's tinnitus at one percent permanent impairment to arrive at a total binaural hearing impairment of one percent.

In a March 9, 2020 report, Dr. Israel, serving as a DMA, reviewed Dr. Theivagt's report and determined that appellant had zero percent monaural hearing loss in each ear. He noted that the February 4, 2020 testing revealed losses of 15, 15, 20, and 25 decibels (dBs) on the right and 20, 25, 25, and 30 dBs on the left at 500, 1,000, 2,000, and 3,000 Hertz (Hz), respectively. Dr. Israel totaled the dB losses to 75 on the right and 100 on the left. These values, when divided by four, resulted in an average hearing loss of 18.75 on the right and 25 on the left, which when reduced by the 25 dB fence, were reduced to zero. When multiplied by 1.5, the resulting monaural hearing loss in each ear was zero percent.

The Board finds that the DMA properly concluded that appellant did not have a ratable permanent impairment of his hearing warranting a schedule award. Although appellant has an employment-related hearing loss, it is not significant enough to be ratable for schedule award purposes.¹⁵

Appellant submitted a June 29, 1998 audiogram, which indicated normal hearing and a July 6, 2018 letter from Dr. Phillips noting abnormal hearing, but providing no audiological testing results. Neither document contained evidence of impairment due to industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*. Therefore, neither document has any probative value.¹⁶ Similarly, the September 21, 2020 report from Dr. Wang, an audiologist, has no probative medical value because an audiologist is not considered a physician as defined under FECA.¹⁷

While Dr. Theivagt added a one percent impairment rating based on appellant's tinnitus, the DMA correctly explained that tinnitus may not be added to an impairment rating for hearing loss under the sixth edition of the A.M.A., *Guides* unless such hearing loss is ratable.¹⁸ Accordingly, as appellant does not have a ratable hearing loss, the Board finds that he is not entitled to a schedule award for the established tinnitus.

¹⁵ *K.P.*, Docket No. 20-0349 (issued July 1, 2020); *G.T.*, *supra* note 12.

¹⁶ *See R.R.*, *supra* note 9.

¹⁷ 5 U.S.C. § 8101(2); *M.P.*, Docket No. 13-1790 (issued December 17, 2013) (an audiologist is not considered a physician under FECA, and the audiologist's opinion regarding the medical cause of a claimant's hearing loss is of no probative medical value).

¹⁸ *K.P.*, *supra* note 15; *G.T.*, *supra* note 12.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish ratable hearing loss for schedule award purposes.

ORDER

IT IS HEREBY ORDERED THAT the October 29, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 5, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

A handwritten signature in black ink, appearing to read "Patricia H. Fitzgerald". The signature is fluid and cursive, with the first name "Patricia" being the most prominent part.

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board